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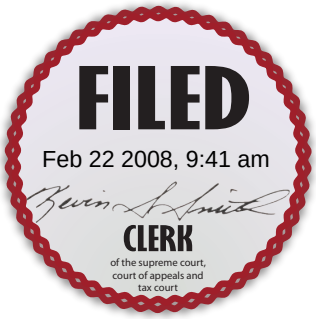

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IN THE
COURT OF APPEALS OF INDIANA

HERBERT JOHNSON,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-0707-CR-634
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Robert Altice, Judge
Cause No. 49G02-0608-MR-152347

February 22, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

Herbert Johnson appeals the sentence imposed by the trial court after pleading guilty to one count of murder and one count of robbery as a class B felony.

We remand for resentencing.

ISSUE

Whether the trial court abused its discretion in its articulation of aggravating factors that it considered in imposing sentence.[1]

FACTS

On the night of August 2, 2006, cab driver Clarence Hoosier was shot and killed in the course of a robbery. On August 17, 2006, the State filed charges against Johnson arising from that event. Specifically, the State charged Johnson with murder; felony murder; robbery, as a class A felony; conspiracy to commit robbery, as a class A felony; and criminal confinement, as a class B felony. Charges arising from the shooting and robbery of Hoosier were also filed against Jamaar Bess and Rodney Harris.

On June 6, 2007, a plea agreement between Johnson and the State was tendered to the trial court. Therein, Johnson agreed to plead guilty to murder and to robbery as a class B felony; the State agreed to dismiss the felony murder, conspiracy to commit robbery, and criminal confinement charges, *and* to not "pursue any possible robbery charges against" Johnson in four other pending investigations. (App. 89). The agreement provided that "all terms and conditions of sentencing . . . , including whether the

[1] We do not reach Johnson's argument that his sentence is inappropriate under Indiana Appellate Rule 7(B).

sentences to be imposed are to be consecutive or concurrent," were "left to the discretion of the Court." *Id.*

At the plea hearing, Johnson testified that he "knew" that he, Harris, and Bess were taking a loaded gun to use in their robbery of the cab driver. (Tr. 30). He further testified that the threesome "knowingly took, while armed with deadly [sic] weapon," Hoosier's money and cell phone from him, and that in the commission of the robbery, Hoosier suffered "serious bodily injury, specifically, a gunshot wound to the chest." (Tr. 31). Johnson testified that it was "correct" that he was "guilty not only of the murder, but . . . guilty of the robbery as well." (Tr. 33). The trial court accepted Johnson's guilty plea and entered judgment of conviction.

On June 27, 2007, the trial court held the sentencing hearing. The State asserted at sentencing that Johnson's lack of criminal history should be given little weight in light of his having been possibly linked to four other robberies. It further asserted that had the matter gone to trial, it believed the evidence would have shown that Johnson fired the fatal gunshot, as well as that it was his idea to commit the robbery and to target a cab driver as the victim. However, the State admitted that initially all of the defendants had given statements that minimized their involvement in the crime. Finally, the State asserted that Johnson's lying-in-wait, or ambush, of the victim was an appropriate aggravating factor. Johnson urged the trial court "to review the criminal histories and juvenile histories of the co-Defendants" as to whether "their statements . . . that [Johnson] was the shooter" were credible. (Tr. 63, 64). Johnson also asserted that the other alleged robberies could not be considered "as proper aggravators . . . because they haven't been

proven." (Tr. 65). Johnson further urged the trial court to "compare" his character to "the character of the co-Defendants." (Tr. 66).

The trial court found that Johnson's "young age, . . . seventeen at the time that this crime was committed," was mitigating. (Tr. 67). It further found "his lack of criminal history" was "mitigating," but did not "give that . . . great weight" because of the "other uncharged robberies" that were noted as "part of the plea agreement." *Id.* The trial court found "the nature and circumstances of the crime," specifically the "lying-in wait" for the cab driver, to be "a very aggravating circumstance." (Tr. 68, 69). Apparently the trial court took judicial notice of other proceedings not involving Johnson, as it further stated as follows:

> I will also note that based on what I've heard and I find it incredible [sic] is that the other two co-Defendants have said that Mr. Johnson was the shooter and I believe based on the evidence this Court has heard over the course of the pendency of this case, that that in fact was true and that's all just based on what I've heard here in court.

(Tr. 68-69). The trial court then found "lying-in wait" to be "a very aggravating circumstance," and concluded that "the aggravators outweigh[ed] the mitigators." (Tr. 69). It imposed the maximum sentence of sixty-five years for murder and ten years for robbery, as a class B felony – the sentences to be served consecutively, for a total of seventy-five years.

DECISION

The day before the trial court imposed Johnson's sentence, our Supreme Court described the considerations to be applied in appellate review of the sentence imposed by the trial court under the current "advisory" sentencing scheme. *Anglemyer v. State*, 868

N.E.2d 482, 491 (Ind. 2007). First, the trial court must issue a sentencing statement that includes "reasonably detailed reasons or circumstances for imposing a particular sentence." *Id.* Second, the reasons or omission of reasons given for choosing a sentence are reviewable on appeal for an abuse of discretion; however, the weight given to those reasons, *i.e.*, to particular aggravators or mitigators, is not subject to appellate review. *Id.* The lack of a reasonably detailed sentencing statement, or a defect as to the trial court's findings or non-findings of aggravators and mitigators, is an abuse of discretion. *Id.* One possible defect in a trial court's finding of an aggravator or a mitigator is the lack of support in the record therefor. *Id.* at 490.

DECISION

Johnson argues that the trial court "abused its discretion by taking judicial notice of evidence from related proceedings to find facts not supported by the record in this case as an aggravating circumstance." Johnson's Br. at 4. Specifically, he argues that the trial court's statement of belief "that Mr. Johnson was the shooter . . . based on the evidence this Court has heard over the pendency of this case," is impermissibly based on evidence heard by the trial court in proceedings involving his cohorts, Bess and Harris. (Tr. 68). We must agree.

The facts admitted by Johnson at his guilty plea hearing are as follows:

> Court: . . . According to the charging information . . . , you, Herbert Johnson, on or about August the 2nd of 2006, knowingly killed another human being, specifically, Clarence Hoosier, and you did that by shooting a deadly weapon, that is, a handgun at against [sic] the person of Clarence Hoosier, inflicting mortal injuries on Mr. Hoosier, causing Mr. Hoosier to die. Is that, in fact what you did in this case?

Johnson: No, sir.

[Johnson's counsel asks permission, which is granted, to question Johnson.]

Johnson's Counsel: Herbert, on August 2nd of last year, you were committing a robbery with some other guys. Right?

Johnson: Yes, ma'am.

Court: And that robbery was of a cab driver, Mr. Clarence Hoosier; right?

Johnson: Yes.

Johnson's Counsel: And during that robbery, Mr. Hoosier got shot; right?

Johnson: Yes.

Court: And you knew what was going on; right?

Johnson: Yes.

Court: You were there? You were participating in the robbery?

Johnson: Yes.

Court: So that you understand, sir, that whether or not you pulled the trigger or not [sic], in [sic] you knew what was going on and you were part of that robbery and you were responsible for everybody's actions there. Is that correct? Even though you didn't do it yourself do you understand that?

Johnson: Yes, sir.

Court: All right. I mean, because you were an accomplice. You were a confederate. A codefendant with these guys. All right? Your guys' plan was to kill – was to rob. Right?

Johnson: It was to rob him, yeah.

Court: Right. But understand that when you have that intent to rob, during the course of that robbery, if you commit a murder, you're good for that murder even if you didn't kill the person. Do you understand that?

Johnson: Yes, sir.

* * *

State: . . . evidence would show that before they ever left Rodney Harris' house, that there was a gun and the gun was loaded and they were taking the gun to use in the robbery of the cab driver, which makes them all guilty of murder irrespective of who pulled the trigger.

Court: All right. Do you agree with that Mr. Johnson?

Johnson's Counsel: We talked about it.

Court: Do you understand that?

Johnson: Yes, sir.

Court: All right. So that you are, in fact guilty of murder; is that correct?"

Johnson: Yes, sir.

Court: All right. And as it relates to the robbery, sir, according to the information I have, on that same date of August the 2nd of 2006, you and Mr. Harris and Mr. Bess, is that Jamaar Bess, is that who the other codefendant was? All right. That the three of you, knowingly took, while armed with deadly [sic] weapon, property of Clarence Hughes [sic] Hoosier, specifically U.S. Currency and a cell phone. And you did that by putting Mr. Hoosier in fear, or by threatening the use of force on Mr. Hoosier, all of which resulted in serious bodily injury, specifically, a gunshot wound to the chest of Mr. Hoosier. And is that what you did as it related to the robbery?

Johnson: Yes sir. (indiscernible) to robbery, but that ain't what I did.

Court: All right. But you were a part of this robbery; right?

Johnson: Yes.

Court: All right. And you knew you were going to go rob there individual [sic]; right, or you would have robbed whoever showed up in the cab. Right? Is that correct, sir?

Johnson: Yes, sir.

> Court: All right. And you knew there was a gun there; right? I mean, otherwise how are you going to get the property; right?
>
> Johnson: Yes, sir.
>
> Court: And so that when the three of you when [sic] there together, that you used this gun, all three of you, or together, all three of you, one of you did, and that was the plan. And you took this man's money. Is that correct?
>
> Johnson: Yes, sir.
>
> Court: All right. And during the course of that he gets injured; right? In fact, he gets killed; correct, sir?
>
> Johnson: Yes, sir.
>
> Court: All right. And so that you are guilty not only of the murder, but you're guilty of the robbery as well. Is that correct, sir?
>
> Johnson: Yes, sir.

(Tr. 28-33).

The above constituted the factual basis that led the trial court to accept Johnson's plea of guilty to murder and to robbery, as a class B felony. We acknowledge that there may be no single and perfect way to establish a factual basis; however, in our collective experiences, the better practice seems to be as follows: the State summarizes the facts that it would have established had the matter gone to trial and elicits the defendant's admission that the facts, as summarized, are true. Something less fact-specific happened here. Nevertheless, we find that the above does – as Johnson argues – establish that at the plea hearing, Johnson unequivocally denied being the one who shot Hoosier.

At the sentencing hearing, the only evidence presented was Johnson's PSI.[2] Attached thereto was the probable cause affidavit, which reflects the hearsay statements of both Bess and Harris alleging that Johnson was the one who shot Hoosier. It is true, as the State notes, that at sentencing Johnson agreed that the PSI was accurate. However, we find such a statement of agreement reasonably responded to the accuracy of its contents as to Johnson's personal history – as the trial court put it, "Does it speak the truth about him?" (Tr. 41) – *not* the contents of the probable cause affidavit.[3] In addition to the probable cause affidavit allegations, the PSI *also* contains Johnson's personal statement denying that he shot Hoosier. Further, at the plea hearing, under oath, Johnson had denied that he shot Hoosier.

In imposing sentence, the trial court stated its "belie[f] based on evidence [it] ha[d] heard" in other proceedings that "Johnson was the shooter." (Tr. 68). It has long been the law in Indiana that the trial court "may not take judicial notice of its own records in another case previously before the court, even on a related subject and with related parties." *Bonds v. State*, 729 N.E.2d 1002, 1006-07 (Ind. 2000). Therefore, the trial court erred in considering what it had heard in the related Harris and Bess cases.

As our Supreme Court explained in *Anglemyer*,

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[2] Members of the victim's family also testified as to the impact of Mr. Hoosier's death on the family.

[3] The State asserts that Johnson acknowledged "that the information in the pre-sentence report, including the affidavit of probable cause, was correct." State's Br. at 6. We find this to mischaracterize the record, which reflects simply that Johnson and his counsel were asked whether the PSI was correct. There was neither a question nor an answer with respect to the accuracy of the probable cause affidavit.

> In order to carry out our function of reviewing the trial court's exercise of discretion in sentencing, we must be told of [its] reasons for imposing the sentence . . . . This necessarily requires a statement of fact, in some detail, which *are particular to the particular defendant and the crime*, as opposed to general impressions or conclusions. Of course *such facts must have support in the record*.

868 N.E.2d at 490 (internal citation omitted; emphasis added). Here, the trial court imposed the maximum sentence of sixty-five years for murder[4] and the advisory sentence of ten years for robbery as a class B felony;[5] and it ordered that he serve the sentences consecutively. Thus, Johnson received an aggregate sentence of seventy-five years. Yet, the trial court's sentencing statement indicates that a major reason for its imposition of said sentence was its "belief" that Johnson was the shooter. The remaining portion of the record, which may properly be considered for appellate review, at this juncture, does not sufficiently establish that Johnson was the shooter. Therefore, we find the trial court abused its discretion in finding that fact to be an aggravating circumstance for purposes of imposing sentence. *See Anglemyer*, 868 N.E.2d at 490.

It may well be that there is evidence which would support ordering Johnson to serve the maximum sentence for murder and to run the sentence for robbery consecutive thereto. However, we do not find the record before us to be adequate for appellate review of the sentence imposed. Hence, we choose not to exercise our discretion under Indiana Appellate Ruled 7(B) to modify the sentence imposed, although we find that the trial court improperly relied on evidence not found in the record of Johnson's proceedings.

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[4] *See* Ind. Code § 35-50-2-3.

[5] *See* I.C. § 35-50-2-5.

Accordingly, given that this was a guilty plea and our finding that the sentencing order fails to meet the requirements of the law, we remand to the trial court for a "new sentencing determination." *Windhorst v. State*, 868 N.E.2d 504, 507 (Ind. 2007).

Remanded.

BAKER, C.J., and BRADFORD, J., concur.